22

FILED
APR 30 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

---

# No. 1225

---

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

*v.*

GOLDEN EAGLE FARM PRODUCTS, INC.

---

**PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

---

J. BERTRAM WEGMAN,
*Counsel for Petitioner.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Petition for writ of certiorari | 1 |
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statement | 2 |
| Reasons relied upon for the allowance of the writ | 8 |
| Conclusion | 11 |


## Table of Cases Cited


| | |
|---|---|
| *Arnall Mills* v. *Smallwood*, 68 F. 2d 57 | 9 |
| *Beals* v. *Hirsch*, 214 App. Div. 86, 94 | 10 |
| *Frankel* v. *Foreman & Clark*, 33 F. (2d) 83 | 10 |
| *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333 | 8 |
| *Standard Rice Co.* v. *Klipstein*, 245 N. Y. 315 | 10 |
| *Winn* v. *Consolidated Coach Corporation*, 65 F. 2d 256 | 9 |

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

---

# No. 1225

---

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

*v.*

GOLDEN EAGLE FARM PRODUCTS, INC.

---

**PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

---

*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Approved Dehydrating Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case.

## Opinion Below

The opinion of the Circuit Court of Appeals (R. 343-346) is reported, 147 F. (2d) 359.

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered January 23, 1945. A petition for rehearing duly made, was denied March 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (Section 347 (a), Title 28, U. S. C.).

## Questions Presented

1. Whether a jury issue is created by only indirect and inferential contradiction of the testimony of wholly disinterested witnesses directly and positively establishing material facts, which testimony is not otherwise contradicted or impeached, nor in any respect incredible.

2. Whether a jury may arbitrarily disregard such disinterested, unimpeached and uncontradicted testimony.

3. Whether there was substantial evidence to support the jury's verdict in this case, and if not, whether the denial of the motion for a new trial was an abuse of judicial discretion.

4. Whether, in an action for the purchase price of merchandise, the substantive rights of the parties being governed by the law of the State of New York, the seller may recover without proof that the goods delivered conformed to the contract of sale.

5. Whether the Court below was in error in its approval of rulings of the Trial Court upon the admission of evidence.

## Statement

This is an action to recover the agreed purchase price of liquid whole eggs sold by the respondent to the petitioner. The petitioner denied that the merchandise delivered was whole eggs, and alleged that in truth and in fact it was

an adulterated mixture; and counterclaimed for damages based upon a breach of warranty.

The substance of the counterclaim was that the petitioner, relying upon the warranties of the respondent, purchased liquid whole eggs from the respondent for the purpose of dehydrating them and delivering them in powder form to the United States Government pursuant to a contract between the petitioner and the Government. The respondent, instead of delivering liquid whole eggs, delivered an adulterated product which the petitioner, without knowledge of the adulteration, processed into egg powder. Upon tender of the powder, it was rejected, and was condemned by the Food and Drug Administration as misbranded and adulterated. The petitioner was ultimately permitted to dispose of it at a lower price, after relabelling to disclose the adulteration.

There was no dispute regarding the existence of an agreement that the respondent would sell and the petitioner would buy such quanitities of liquid whole eggs as would be required to fill petitioner's contracts with the United States Government for the delivery of spray-dried whole eggs. The price was fixed at 23¾¢ a pound. The respondent knew that the petitioner was purchasing the eggs to be dehydrated for delivery under Government contracts (R. 35, 40-41).

Following some small deliveries during March 1942, which the petitioner used to test its equipment and operating technique (R. 16-19, 53), a number of full-scale deliveries were made between March 27 and the first week of May, 1942, and were promptly paid for. They were dehydrated by a mechanical process, (R. 46-47, 98) in which no substance entered into the egg powder other than the liquid eggs supplied by the respondent (R. 68), and no change resulted other than removal of moisture (R.

98). The petitioner's entire operation was to receive the liquid eggs from the respondent, put them through the dehydrating process, pack the resulting powder in barrels, and store it until a sufficient quanitity should be accumulated to make deliveries under its contracts.

When the petition made its first tender of delivery of egg powder, the Department of Agriculture rejected it for deficiency in fat content (R. 334). A second tender, made before receipt of the first rejection, was also rejected for the same reason (R. 334).

On May 12, 1942, an inspector of the United States Food and Drug Administration met, upon its arrival at the petitioner's plant, the truck on which the day's shipment of liquid eggs was being delivered by the respondent to the petitioner. The eggs were in closed drums (R. 33, 139), which had been placed on the truck at the respondent's premises and had not been touched from that time until their arrival at the petitioner's plant (R. 209). The truckman who made the delivery was the respondent's truckman (R. 209). The inspector himself opened the drums and took samples at random (R. 139).

These samples were delivered by the inspector in person to the New York station of the Food and Drug Administration (R. 140, 145). They were there tested and analyzed by chemists of the Food and Drug Administration, who testified to their findings.

The percentage of total solids was higher, and the percentage of fat was lower, than normal (R. 146). Further analysis to determine the reason for the discrepancy disclosed the presence of reducing sugars in the proportion of 1.65% to 1.74% (R. 85, 146). This is approximately four times the normal sugar content (R. 88, 147) and showed necessarily that sugar had been added (R. 147).

It was testified that the addition of sugar to liquid whole eggs would lower the percentage fat content (R. 100), and specifically, that the quanity of reducing sugar found in the analysis of the sample of respondent's liquid eggs was sufficient to account for the fat deficiency reported by the Department of Agriculture in the defendant's product, i. e., 35.64% and 35.94% of fat, as compared with the minimum standard of 40% established by the Department (R. 102).

An analysis of samples of the petitioner's egg powder revealed the same type of sugar which had been found in the respondent's liquid eggs, in substantially the same proportion in which it occurred in the liquid eggs, calculated to a dried basis (R. 88, 99, 106). Neither the liquid nor the egg powder consisted of pure eggs (R. 195), but less than 90% of whole egg and at least 10% of a mixture of reducing sugars similar to corn syrup (R. 189, 195).

The liquid samples taken from respondent's truck were taken from one of the four lots for which the respondent sues in this action (May 12, 1942; see R. 5).

There was no contradiction of this positive evidence that the respondent's liquid eggs were adulterated.

The respondent's chemist testified to his examination of samples of petitioner's egg powder, taken from the warehouse (R. 216), and representing earlier shipments of eggs. His examination suggested to his mind the possibility of the presence of milk powder as an adulterant, but he did not state as fact or as opinion that milk powder was present (R. 231). His tests did not show the presence of lactose, or milk sugar, which would necessarily have been found if milk powder were present (R. 242). Nevertheless, allowed to testify upon the hypothesis that milk powder might be present, he stated that if it had been added as a powder to the liquid egg, it would have clogged the spray nozzles

(R. 227-228); and that if it had been put in as a liquid before spraying, the resulting product would have had to be homogeneous (R. 241).

He did not testify at all regarding the liquid eggs which were shown to have been adulterated.

This testimony as to the supposed impossibility of adulteration by the addition of milk solids to the liquid eggs, completely irrelevant as it was to any evidence produced by either party, was supplemented by a diagram prepared by the witness and introduced in evidence. The diagram was admitted in evidence over strenuous objection, upon the representation that it would be proved to be a plan of a typical spray-drying plant (R. 96), and that the method shown in the plan was the method adopted by the petitioner (R. 96, 97). That representation was never made good, but the exhibit was allowed to remain in evidence, petitioner's motion to strike being denied on the theory that it was offered to "indicate the general principles for the benefit of the jury" (R. 226). The witness had never seen the petitioner's plant, and did not know the type of equipment they had (R. 227). It was denied by the petitioner that this diagram was a counterpart of its plant, and it was testified that the nozzle shown was entirely different from petitioner's (R. 128, 135).

This witness was permitted, over objection, to conduct a demonstration before the jury, to show that the addition of levulose (a kind of sugar syrup) to liquid eggs would change their color and appearance (R. 218). There was no proof and not even any suggestion of the presence of levulose (which is quite different from the kind of sugar found in the eggs by the U. S. Food & Drug Administration experts) in either the eggs or the egg powder; indeed, there was proof to the contrary (R. 190-191; compare R. 229). In the demonstration, the witness added to liquid eggs a proportion of levulose at least three to four times as great as

the 10% adulteration which actually existed in the eggs in suit (R. 220, 221-222, 254). Surely this had no proper place in the trial. The jury may well have been thereby misled.

Respondent's officers testified that its egg-breaking operations were carried on by about twelve girls, under the supervision of Nathan Gray and Hyman Lazar (R. 261-262, 269). The latter was stated to be in the Army (R. 34, 261), and did not testify. None of the girls were produced, and there was no explanation at all offered or suggested for their absence. Gray testified only that *he* had never put anything into the liquid eggs (R. 270-271).

The case was tried before a jury. At the close of all the evidence, the petitioner moved for a directed verdict in its favor (R. 45, 299, 303), which was denied (R. 304). A verdict was returned in favor of the respondent. The petitioner moved to set aside the verdict and for judgment notwithstanding the verdict, and in the alternative for a new trial (R. 318). These motions were denied.

On appeal, the petitioner urged that the proof of adulteration of the liquid eggs before delivery to the petitioner was so direct and positive, and so completely unimpeached and uncontradicted, that there was no jury issue on that point; that there was likewise no issue as to the existence of the warranties alleged in the counterclaim, and consequently the verdict was not supported by any substantial evidence.

The Circuit Court of Appeals affirmed (R. 343-346), in its opinion suggesting some doubt as to the validity of the rule urged upon it by the petitioner, but holding that it need not be considered since there was "ample testimony which, at least in an indirect manner" contradicted the petitioner's witnesses. It held also that there had been no error in the admission of evidence.

Petitioner moved for a rehearing (R. 347-348) upon the ground that the Court had not applied the correct rule of

law as to the burden of proof, as established by the New York court, and pointed out that the contradiction referred to in the Circuit Court's opinion did not touch the petitioner's proof with respect to the May deliveries for which the respondent claims in this action. Rehearing was denied (R. 348), without opinion.

## Reasons Relied Upon for the Allowance of the Writ

### I

Despite the relative insignificance of the case, it presents a question of very great importance in the trial of issues in the Federal courts, upon which the decision below is in conflict with decisions in other circuits, and is contrary to the ruling of this Court in the case of *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333.

The essential point in controversy was whether the plaintiff had delivered liquid whole eggs to the defendant, in conformity with its contract of sale. Upon that point, the defendant, petitioner here, proved by competent and wholly disinterested witnesses that samples of the liquid eggs taken from the containers in which they had been placed by the respondent, before they ever reached the petitioner, were found to be adulterated.

There was no contradiction of this testimony.

There was, however, testimony from an expert presented by the respondent that he had examined samples of egg powder, produced in the petitioner's dehydrating plant from respondent's earlier deliveries of liquid eggs, and that in his opinion the adulterant which he thought might be present in the powder could not have been introduced before dehydration.

The Court below, like the Trial Court, treated this as sufficient contradiction of the testimony of petitioner's witnesses to create an issue for the jury. It put aside the

petitioner's contention that there was no contradiction, and no issue, saying "there is ample testimony which, at least in an indirect manner, contradicts what defendant's witnesses said."

The question is thus presented whether the jury may be permitted to infer a fact, in no way directly proved, in the face of positive and otherwise uncontradicted testimony of unimpeached wholly disinterested witnesses that the fact sought to be inferred does not exist. This Court held in *Pennsylvania Railroad Co.* v. *Chamberlain*, *supra*, that such an inference is not permissible, and on that ground reversed that judgment. The Circuit Court of Appeals for the Sixth Circuit, in *Winn* v. *Consolidated Coach Corporation*, 65 F. (2d) 256, and the Circuit Court of Appeals for the Fifth Circuit, in *Arnall Mills* v. *Smallwood*, 68 F. (2d) 57, rejected such inference for the reason stated, upon the authority of the *Chamberlain* case.

This direct conflict is emphasized by the fact that what the Court below refers to as indirect contradiction was at most only a secondary inference. The respondent's witness testified to certain characteristics which he found in the egg powder examined by him (R. 231, 232-233). He inferred, and stated as his opinion, that those characteristics showed the presence of foreign substances which could not have been in the liquid eggs before spraying (R. 241). But the egg powder which he examined was not prepared from the eggs for which the respondent sued, while the testimony of the petitioner's witnesses (the U. S. Food and Drug Administration employees) showed adulteration of the very eggs in suit. To regard the respondent's evidence as even indirectly contradicting their testimony, it is necessary to make the further inference, or assumption without proof, that what was true of the eggs previously dehydrated was also true of the eggs in suit.

## II

An additional reason for the allowance of the writ is that the Court below has decided a question of local law in a manner contrary to applicable decisions of the State courts; although petitioner recognizes that this question by itself may be hardly important enough to justify urging this ground if no other were present.

The plaintiff, suing for the price of four deliveries of liquid eggs, was bound to prove that they conformed to the contract. There is no such proof in the record. The positive proof was that samples taken from one of the deliveries sued for were deficient in fat. Although the defendant offered the further proof, in verification and explanation of the deficiency, that there was adulteration, the ultimate fact was the deficiency.

Under the applicable decisions of the New York courts, the seller was not relieved of the burden of proving compliance with the contract because the purchaser had pleaded a counterclaim for breach of warranty. Some of the authorities are collected in the opinion in the case of *Frankel* v. *Foreman & Clark*, 33 F (2d) 83, 86. See also *Standard Rice Co.* v. *Klipstein*, 245 N. Y. 315, 318; *Beals* v. *Hirsch*, 214 App. Div. (N. Y.) 86, 94.

## III

This case also presents a question concerning the admissibility of evidence, which is so closely related to the principal question above stated that it is believed to merit consideration for that reason if for no other.

The Trial Court permitted two separate visual demonstrations, with no basis in the factual proof, which the jury must have thought was evidence in contradiction of petitioner's proof, when in truth there was no contradiction.

Each was on a matter which was wholly foreign to the issues, but which the jury, having seen, may have mistakenly considered pertinent. In effect, the witness was permitted to confirm by this ocular evidence an opinion which, had it been given in response to a hypothetical question, would have been rejected as assuming facts contrary to the proof.

It is respectfully submitted that the Court here sanctioned such a departure from the accepted and usual course of judicial proceedings as to transcend the bounds of discretion.

## Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., April 28, 1945.

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

By J. BERTRAM WEGMAN,
*Counsel for Petitioner.*

(8013)

(23)

Office - Supreme Court, U. S.
FILED
MAY 17 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 1225

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

*against*

GOLDEN EAGLE FARM PRODUCTS, INC.,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MAURICE RUBINGER,
*Attorney for Respondent.*

# INDEX


| | PAGE |
|---|---|
| Statement | 1 |
| Petitioner's Specifications of Questions Presented Are Without Importance or Substance | 2 |
| The Facts | 2 |
| The Petitioner Fails to Advance Any Tenable Premise to Support Its Application for the Issuance of a Writ | 3 |
| Conclusions | 6 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 1225

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

*against*

GOLDEN EAGLE FARM PRODUCTS, INC.,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

### Statement

The petition is one for a writ of certiorari to review the judgment of affirmance of the United States Circuit Court of Appeals for the Second Circuit.

The opinion of the Circuit Court (R. 343-346) is reported in 147 F. (2nd) 359.

Petitioner claims jurisdiction under Section 240(a) of the Judicial Code, as amended (Section 347(a), Title 28, U. S. C.).

The petitioner has served no brief in support of the petition.

## Petitioner's Specifications of Questions Presented Are Without Importance or Substance

Petitioner, at page 2 of the moving papers, asserts that five questions are presented for consideration.

It is respectfully submitted that not only are the questions without importance or meriting consideration by this Court, but are fallacious, contrary to the facts and directly opposed to the findings of the jury and the determinations of the Courts below.

## The Facts

The action is one to recover the sum of $5,700, the purchase price of liquid eggs sold and delivered by respondent to petitioner.

The respondent is a corporation engaged in the sale of eggs, both in liquid form and in the shell, under the supervision of its President, Mr. Charles Lazar, who has had 42 years of experience in the egg business (R. 34).

The petitioner entered into the business of dehydration of eggs in or about the month of March, 1942. At that time, Mr. Harry Shaw, one of its officers and directors, approached Mr. Lazar and inquired as to the cost of liquid eggs. A price of 24¢ per pound was quoted and after some negotiation, a price of 23¾¢ was agreed upon (R. 16). Mr. Shaw first requested that small deliveries be made for sampling, testing and experimenting. The sample deliveries were made, petitioner's chemist made tests and Mr. Shaw pronounced the results to be satisfactory (R. 118). Thereafter and from March until May 5th, 1942, respondent made substantial deliveries of liquid eggs, for which payment was made.

On May 7th, a shipment of liquid eggs was made, the selling price being $1,140; on May 8th, there was a like

shipment in the sum of $1,140; and on May 12th and 13th, two separate shipments were made, the selling price in each instance being $1,710. The total selling price of these four shipments aggregated $5,700 for which sum, payment was demanded and when refused, the present action was instituted (R. 2, 3).

The petitioner resisted payment, asserting a breach of warranty as to the quality of the eggs sold, and a counterclaim for damages (R. 6-10). The issue was sharply contested at trial and was determined by the jury in respondent's favor.

## The Petitioner Fails to Advance Any Tenable Premise to Support Its Application for the Issuance of a Writ

The petition at pages 8 to 11 asserts three reasons for consideration by this Court. We shall briefly discuss each and show its inadequacy.

### I

Petitioner mistakenly asserts the absence of a conflict of testimony as to the responsibility for the claimed adulteration of the eggs purchased.

At trial, the testimony of petitioner's and respondent's witnesses was directly contradictory as to every material detail of the controversy and squarely raised the issue of respondent's performance under the contract, including, of course, the question of placing the responsibility for any asserted adulteration of the eggs which were the subject of sale (R. 32, 40, 43, 44, 115, 126, 216, 227, 230, 235, 241, 261, 268, 272).

Upon this subject the opinion of the Circuit Court reads as follows:

> "Appellee contends that, as on the issue of whether the eggs had been adulterated before receipt by the defendant, there was solely the uncontradicted testimony of its witnesses, we must apply the rule that, in such circumstances, there is no question which may properly be submitted to the jury. We need not discuss that rule and its many exceptions. (Cases cited.) For here there is ample testimony which, at least (fol. 346) in an indirect manner, contradicts what defendant's witnesses said. It was for the jury to determine whether the assertions of the defendant's witnesses that the sugar was added before the defendant received the eggs, or the plaintiff's witnesses that the sugar could not have been added before the defendant processed them, was true" (R. 344-345).

Clearly the issue was one for the jury.

## II

The subjects of due performance by the respondent as well as petitioner's claim of breach of warranty were sharply litigated at trial, the Trial Court defining the issue as follows:

> "The Court: Now, the question is what caused that fat content to be below the standard. If the defendant after it received the eggs caused them to be below the standard, why then, of course, that is the end of that counterclaim as well as the defense. If, on the other hand, as the defendant claims, the dehydrating process had sugar in them and that caused the fat content to be below the standard, then of course, the defendant is within its counterclaim; so that the jury will have to decide who caused the fat content to be below the standard, if it was done by anybody" (R. 84).

Thereafter, the Court charged the jury fully on the subject (R. 305, 316). There was no exception to the charge or requests to charge (R. 316).

The law was properly applied by the Trial Court, acquiesced in by petitioner's counsel, factually determined by the jury, all of which was unanimously approved by the Circuit Court of Appeals.

## III

Finally, respondent raises the question of the admission of certain evidence by the Trial Court.

The propriety of the admission of the evidence complained of is fully disposed of in the opinion of the Circuit Court, which on that subject reads as follows:

> "There was no error in admitting the chart showing the general layout of a spray drying plant. The chart was used solely for the purpose of explaining the evidence, and the defendant introduced evidence showing that the plant in the diagram differed from its own, primarily in that the defendant used a horizontal spray and the diagram indicated a vertical spray. The admission of the diagram was clearly within the discretion of the court. And the following statement by the court cleared up any ambiguity as to its use:
>
> > 'The Court: It is understood that this diagram in no way indicates the plant, dehydration plant of the defendant. * * * But it does indicate the general principles for the benefit of the jury.'
>
> "Nor was there error in permitting the demonstration indicating that nulomoline changed the color of the liquid eggs. It was made clear that the plaintiff was not attempting to prove that nulomoline was the sugar product used to adulterate the eggs, but was merely using the demonstration to show that a sugar product would change the color. This too was a matter within the trial court's discretion" (R. 345-346).

## CONCLUSION

**The petition for a writ of certiorari should be dismissed, with costs.**

Respectfully submitted,

MAURICE RUBINGER,
*Attorney for Respondent.*

(24)

Office - Supreme Court, U. S.
FILED
MAY 25 1945
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1944**

**No. 1225**

---

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

against

GOLDEN EAGLE FARM PRODUCTS, INC.,
*Respondent.*

---

## REPLY BRIEF FOR PETITIONER

---

J. BERTRAM WEGMAN,
*Counsel for Petitioner.*

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 1225

---

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

against

GOLDEN EAGLE FARM PRODUCTS, INC.,
*Respondent.*

---

## REPLY BRIEF FOR PETITIONER

---

### Respondent's Point I

Petitioner recognizes that the refusal of the Trial Court to set aside the verdict in this case, and the affirmance of the judgment by the Circuit Court of Appeals, make it difficult to believe that there was no jury issue. The respondent apparently relies upon that truism to support its statement that the testimony was "directly contradictory as to every material detail of the controversy" (Resp. Br. p. 3).

The statement is simply not true. It is not supported by the respondent's citations to the record, and is controverted by the opinion of the Circuit Court, which found only indirect contradiction (R. 345). In the briefs submitted to the Circuit Court of Appeals, the petitioner's insistence that there had been no contradiction of its evidence showing adulteration of the eggs in suit brought from the respondent no reference to the record to disprove

it. A careful examination of the respondent's record references in its brief in this Court shows none which have any recognizable connection with the claim which they are cited to support. The only references which are at all in point are those at R. 227 and R. 235, which the Court below referred to as assertions "that the sugar could not have been added before the defendant processed" the eggs (R. 345).

But those assertions were not made regarding the liquid eggs in suit. They were made with specific reference to samples of egg powder, processed from eggs previously delivered. That is why the Circuit Court referred to them as contradicting the petitioner's witnesses only "in an indirect manner", and why the petitioner contends that the decision below is contrary to principles heretofore announced as controlling by this Court.[1]

The opinion below plainly intimates the Court's skepticism as to the validity of the rule that the jury must not arbitrarily reject the uncontradicted testimony of a witness (R. 344, marginal note). Its holding that the rule is not involved in the present case because there is indirect contradiction of the testimony, in effect overrides the rule. It is difficult to imagine any record in which some indirect contradiction of such positive testimony could not be found.

---

[1] It is essential to notice something which seems to have been altogether ignored below, and that is that in reality there were two separate cases tried in this one proceeding. One was plaintiff's claim for liquid whole eggs delivered between May 7th and 13th. The other was defendant's counterclaim for damages for delivery of adulterated eggs between March 24th and May 5th.

There was not a word of contradiction, direct or indirect, of defendant's proof by disinterested witnesses that the deliveries of May 7th to 13th were bad. There was so-called indirect contradiction of the resulting inference that the deliveries between March 24th and May 5th were bad. This the Court below has held to be indirect contradiction of defendant's proof concerning the May 7th to 13th deliveries. Of course it was not even indirect contradiction, but assuming that it was, that cannot be said to be enough to sustain the plaintiff's burden of proof. The law of the State of New York is clear that plaintiff must prove delivery of what was warranted before recovery of the purchase price may be had.

Certainly the present case cannot be distinguished on that ground from *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 333, for in that case there was also indirect contradiction. Yet this Court held that such contradiction, by inference only, was not sufficient to create a question for the jury. Apparently the Court below has failed to apprehend the full effect of, and has refused to follow, the *Chamberlain* decision, while the respondent seeks to justify the result below by reference to direct contradictions, which the Court below could not find, and which, indeed, are not there to be found.

**Respondent's Point III**

The respondent, quoting from the opinion below, reiterates the justification for admitting the demonstration of a mixture of nulomoline and liquid eggs, that it was merely used to show that a sugar product would change the color.

Were that literally correct, the demonstration would still have been improper and grossly prejudicial, for the reason that the amount of sugar (nulomoline) added to the eggs was admittedly at least three to four times as great as the amount used as an adulterant in the eggs in suit (R. 220, 222). The fact is, however, as the record shows, that the demonstration was offered to show that *levulose* would change the normal color and appearance of liquid eggs (R. 218). There was specific objection on the ground that the Government chemists had testified flatly that no sugar of the class to which levulose belongs was present in the adulterated eggs received from the respondent (R. 219; cf. R. 190-191). It was taken by the Trial Court subject to connection, although counsel for the respondent refused to state that he intended to prove the presence of levulose in the egg powder (R. 218).

The witness who conducted the demonstration was the same chemist whose opinion, that the adulteration found in

the egg powder could not have taken place before dehydration, is offered as indirect contradiction of the testimony of the Government chemists. The demonstration, much more powerful in its effect upon a jury of laymen than any amount of technical testimony, inevitably gave the impression of confirming an opinion which in fact it could not at all confirm.

Therein, in all probability, lies the explanation of this verdict. A verdict for a plaintiff ought not to be sustained simply because there was indirect contradiction of the defendant's proof in support of a counterclaim. The plaintiff has the burden of proof. It cannot reasonably be allowed to rest its recovery upon secondary inference of a fact, the existence of which is negatived by positive and otherwise uncontradicted proof. Not only did the Circuit Court of Appeals fail to follow the *Chamberlain* case, but it had to stretch to find an inference that there was contradiction of petitioner's proof, when in fact there was none.

This case presents the question whether a trial court may abdicate its duty to direct a verdict when such a direction is required by the facts.

Respectfully submitted,

J. Bertram Wegman,
*Counsel for Petitioner.*